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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

NAPOLEON JAMES,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

NUMBER BELOW: 060-82

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

DID THE STATE COURT ERR BY FAILING TO TEST THE CONSTITUTIONALITY OF THE INVESTIGATORY DETENTION OF PETITIONER UNDER THE GUIDELINES SET FORTH IN *UNITED STATES v. CORTEZ*, 101 S.CT. 690 (1981)?

QUESTION TWO:

DID THE SEARCH OF PETITIONER'S AUTOMOBILE EXCEED THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF A SEARCH PURSUANT TO AN INVESTIGATORY DETENTION?

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JURISDICTION

The Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas affirmed the judgment of the trial court which found Petitioner guilty of the misdemeanor offense of possession of marihuana. The opinion of the Court of Appeals was delivered on December 10, 1981 (A-1). No motion for rehearing was filed. On January 22, 1982, Petitioner timely filed Cause No. 060-82 with the Court of Criminal Appeals of Texas, seeking a petition for discretionary review of the decision of the Court of Appeals. The Court of Criminal Appeals of Texas refused said petition without written opinion on March 24, 1982 (A-6). No motion for rehearing was filed. Jurisdiction to

review the judgment of the state court by writ of certiorari is conferred on this Court by 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U. S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

On December 14, 1978, Officer Michael Coker of the Dallas Police Department was driving routine patrol in a marked patrol car. He was in uniform. He was an officer with four and one-half years of experience. While driving through a large apartment complex which consisted of several buildings and which he described as a high offense area where burglaries and criminal mischief had been frequent, Officer Coker heard a sound which he believed to be a large pane of glass breaking. He did not see what caused the sound.

Officer Coker stopped his car and stepped out to investigate. His testimony was that he believed that someone was committing a burglary or a criminal mischief. At this time, he saw Petitioner walking at a fast pace away from the general area from which the sound had come. Officer Coker's opinion was that Petitioner appeared nervous and in a hurry. Petitioner then got into an auto-

mobile and began driving away at what Officer Coker considered to be a high rate of speed for the apartment complex.

Officer Coker got back into his patrol car, pursued and stopped Petitioner. When stopped, Petitioner's automobile was still in the apartment complex. Officer Coker testified that he stopped Petitioner because he believed that a burglary or a criminal mischief had been committed, that Petitioner was a suspect, and that he wanted to detain Petitioner until he could get someone to check the apartments. Officer Coker then exited his car and approached Petitioner's automobile. As he approached, he saw Petitioner lean forward and lower his shoulder, which appeared to Officer Coker as if Petitioner had dropped something on the floorboard. At this time, Officer Coker became concerned for his safety, whereupon he returned to his car and called for cover. When a cover officer arrived, Officer Coker again approached Petitioner's automobile and asked Petitioner to step out. Petitioner did so, and Officer Coker escorted him to the rear of his automobile. While Petitioner stood at the rear of his automobile, accompanied by the cover officer, Officer Coker walked back to the front of the automobile, shined a light in the automobile where Petitioner had leaned forward, and found a plastic bag containing marihuana on the floorboard. Petitioner was then placed under arrest for possession of marihuana and transported to the Dallas city jail. Other than a phone call to the dispatcher asking whether any reports of burglaries had come in from that location, no further investigation of the suspected burglary or criminal mischief was done.

The federal questions sought to be reviewed were raised in the trial court by the attorneys for Petitioner

objecting to the stop of Petitioner and the search of his automobile on Fourth Amendment grounds. This was done during the course of the trial, when Officer Coker testified that he stopped Petitioner and when he testified that he searched Petitioner's automobile. The trial court overruled both of Petitioner's Fourth Amendment objections. The federal questions sought to be reviewed were also raised in the appellate court. See Appendix A-1 through A-6. The federal questions sought to be reviewed were timely and properly raised so as to give this Court jurisdiction to review the matter on writ of certiorari.

ARGUMENT

I.

DID THE STATE COURT ERR BY FAILING TO TEST THE CONSTITUTIONALITY OF THE INVESTIGATORY DETENTION OF PETITIONER UNDER THE GUIDELINES SET FORTH IN *UNITED STATES v. CORTEZ*, 101 S.CT. 690 (1981)?

The state court failed to test the constitutionality of the investigatory detention of Petitioner under the guidelines set forth in *United States v. Cortez*, 101 S.Ct. 690 (1981). The court simply held that the investigatory detention of Petitioner was lawful based upon the reasonableness of the police officer's suspicions.

In *United States v. Cortez*, supra at 695, this Court wrote:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The Court then went on to explain the essential elements of "particularized suspicion". First, the officer's assessment

must be based upon all the circumstances. Second, the officer's assessment must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. See *United States v. Cortez*, supra. The Court of Criminal Appeals of Texas has further stated, "A corollary to this is that the 'criminal activity' suspected must likewise be 'particularized'." *Hull v. State*, 613 S.W.2d 735, 739, n.10 (Tex. Crim. App. 1981).

By failing to test the constitutionality of the investigatory detention of Petitioner under the guidelines set forth in *United States v. Cortez*, the state court has decided a federal question in a way in conflict with a decision of this Court. The constitutionality of the investigatory detention of Petitioner should have been subjected to the "particularized suspicion" test and to no other test. The Court of Criminal Appeals of Texas has recognized, "That a generalized suspicion will not suffice, is no longer open to debate. For *the most recent, as well as potent*, affirmation in this regard to date has been made in *United States v. Cortez* (Citation omitted and emphasis added)." *Hull v. State*, 613 S.W.2d 735, 739 (Tex. Crim. App. 1981). The "particularized suspicion" test set forth in *United States v. Cortez* is, therefore, the minimum standard of reasonableness in this area of Fourth Amendment law. The courts of Texas can give more protection to individual citizens in this area, but they cannot give less. By testing the constitutionality of the investigatory detention of Petitioner in the manner in which it did, and by failing to test the constitutionality of said detention with the "particularized suspicion" test, the state court gave less protection to Petitioner than is required by this Court in *United States v. Cortez*.

II.

DID THE SEARCH OF PETITIONER'S AUTOMOBILE EXCEED THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF A SEARCH PURSUANT TO AN INVESTIGATORY DETENTION?

The state court held:

> Although neither the investigatory detention nor . . . (Petitioner's) "dropping" motion may have been sufficient to authorize a search, we conclude that the circumstances reasonably justified the officer in walking back to the vehicle and placing himself in a position to observe whatever was in plain view. We hold that such observation did not constitute an unreasonable search in violation of . . . (Petitioner's) rights under the Fourth Amendment, and, therefore, his motion to suppress was properly overruled.

Appendix A-4 through A-5. Although the state court did not say that the investigatory detention alone was sufficient to authorize a search, it did hold that, while Petitioner was being detained for investigation, the officer was reasonably justified in walking back to the automobile to place himself in a position to observe whatever was in plain view. The state court, therefore, has decided an important question of federal law which has not been, but should be, settled by this Court, and that is, "What is the constitutionally permissible scope of a search of an automobile pursuant to an investigatory detention of an occupant of the automobile?" Once Petitioner was detained at the rear of his automobile, should the police officers have been limited to securing their safety by searching only

Petitioner's person and not the automobile? If so, was there any justification for the police officer in walking back to the front of the automobile to place himself in a position to observe whatever was in plain view, or should the cover officer have remained with Petitioner while Officer Coker checked the apartments? Was the discovery of the marihuana a plain view observation given the fact that the police officer walked back to the front of the automobile with the purpose to discover whatever there was on the floorboard of Petitioner's automobile?

It is Petitioner's position that the police officers did not have the right to even conduct a pat down search of his person. There is no evidence in the record to show that the police officers had reason to believe that Petitioner presented a danger to them or to others once he was removed from his automobile and positioned at the rear of the automobile, and there is no indication in the record that Officer Coker could not have safely completed his burglary or criminal mischief investigation while Petitioner was detained at the rear of the automobile. All indications are that Petitioner was securely detained. See *Terry v. Ohio*, 392 U.S. 1 (1968).

Furthermore, furtive gestures, combined with an officer's statement that he had a fear for his safety, have been held in Texas to be insufficient to support a search of an automobile for weapons. In Texas, the facts of each case must show that the officer had reasonable grounds to believe he was in danger to justify a search of the vehicle. *Branch v. State*, 593 S.W.2d 324 (Tex. Crim. App. 1980); *Beck v. State*, 547 S.W.2d 266 (Tex. Crim. App. 1976); *Keah v. State*, 508 S.W.2d 836 (Tex. Crim. App. 1974); *Brown v. State*, 481 S.W.2d 106 (Tex. Crim. App. 1972). Although

Officer Coker may have acted reasonably in calling for cover, the record does not contain facts which show that he had reasonable grounds to believe he was in danger so as to justify a search of Petitioner's automobile.

It follows, therefore, that there was no justification for the police officer to walk back to the front of Petitioner's automobile to view whatever was on the floorboard of the automobile. The "plain view" exception to the warrant requirement requires that the police officer must have a prior justification for his intrusion at a time when he inadvertently comes across a piece of incriminating evidence. *Coolidge v. New Hampshire*, 91 S.Ct. 2022 (1971). Not only was there no justification for Officer Coker's intrusion into Petitioner's automobile, but he admitted that he walked back to the front of the automobile to discover what was on the floorboard, and, therefore, his discovery was not inadvertent but intentional.

CONCLUSION

For the reasons given, a writ of certiorari should issue to review the judgment of the state court.

Respectfully submitted,

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